UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA *ex rel.* Donna Mendez & Selina Rushing,	§	
	§	
STATE OF TEXAS *ex rel*. Donna Mendez & Selina Rushing,	§	
	§	Civil Action No. 4:11-cv-2565
Plaintiffs,	§	
v.	§	
Doctors Hospital at Renaissance, Ltd.; Alonzo Cantu, *et al*.,	§	
Defendants.	§	

UNITED STATES' NOTICE OF SUPPLEMENTAL AUTHORITY

Although it has not intervened in this *qui tam* action, the United States remains the real party in interest. *United States ex rel. Vaughn v. United Biologics, L.L.C.*, 907 F.3d 187, 193 (5th Cir. 2018). Because the False Claims Act is the primary tool of the United States to redress fraud on the government, the United States has a substantial interest in the development and correct application of the law in this area.

Accordingly, the United States wishes to inform the Court of a recent Fifth Circuit decision that, while not cited by any of the parties, may provide guidance to the arguments made in section II.A.2 of DHR's Motion to Dismiss [Dkt. 158, at 13–14]. In pertinent part, the decision states:

> Defendants also point us to a pair of cases—one from a different circuit, one from a district court, both involving the civil False Claims Act—declining to find that certain claims submitted to Medicare were fraudulent. *See United States v. AseraCare, Inc.*, 938 F.3d 1278, 1285 (11th Cir. 2019); *United States ex rel. Wall v. Vista Hospice Care, Inc.*, 2016 WL 3449833, at *19 (N.D. Tex. June 20, 2016). But in those cases, there was no evidence of fraud beyond (1) after-the-fact expert testimony that the initial determinations of hospice eligibility were inaccurate, and (2) unrelated anecdotes of lax business practices. *AseraCare*, 938 F.3d at 1285; *Wall*, 2016 WL 3449833, at *19. Both cases recognized that stronger evidence, like

> facts inconsistent with doctors' proper exercise of their clinical judgment, could change the outcome. *See AseraCare*, 938 F.3d at 1297; *Wall*, 2016 WL 3449833, at *17. That stronger evidence—of lies, kickbacks, and fabrication—is present here.
>
> From *AseraCare* and *Wall*, defendants derive an "objective falsity" theory. Under this theory, clinical judgments, like the ones underlying hospice and home health certifications, cannot be the basis of a fraud prosecution unless the government offers expert testimony to prove them objectively false. But health care providers cannot immunize themselves from prosecution by cloaking fraud with a doctor's note. *See United States v. Veasey*, 843 F. App'x 555, 561–62 (5th Cir. 2021) (rejecting the argument that a factual determination that a patient is "homebound" is a medical opinion that cannot establish intent to commit fraud). Categorical evidentiary requirements are at odds with a jury's ability to consider a broad array of direct and circumstantial evidence. *See Sanjar*, 876 F.3d at 745 (rejecting a categorical rule requiring expert testimony in health care fraud cases); *see also* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) 1.07 (2015) ("The law makes no distinction between the weight to be given either direct or circumstantial evidence."). What is more compelling: a doctor's testimony that he lied when certifying a patient or an expert's testimony that he would have made a different clinical determination than the certifying doctor? Common sense suggests the former, which is in abundance here.

United States v. Mesquias, 29 F.4th 276, 282–83 (5th Cir. Mar. 24, 2022).

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Dated: June 9, 2022

Respectfully submitted,

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